

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL BAIR

Claimant

VS.

GENERAL MOTORS, LLC

Self-Insured Respondent

Docket No. 1,066,796

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 14, 2013, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Michael R. Wallace of Shawnee Mission, Kansas, appeared for claimant. Elizabeth R. Dotson of Kansas City, Kansas, appeared for self-insured respondent.

The Administrative Law Judge (ALJ) found claimant's August 8, 2013 accident occurred from no identifiable risk and was indistinguishable from day-to-day living activities. Additionally, the ALJ found the record showed claimant's low back symptoms were a temporary aggravation of a preexisting injury. Therefore, claimant's requests for medical and temporary total benefits were denied under K.S.A. 2012 Supp. 44-508(f).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 13, 2013, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues he would not have suffered his unexplained fall if he were not in the course of an employment errand. Moreover, claimant contends there is no evidence to suggest he traverses metal steps or carries tools while away from his workplace, and therefore these activities are not day-to-day living activities. Further, claimant argues all physician records in evidence concur the prevailing factor and need for medical treatment is the accident of August 8, 2013.

Respondent maintains claimant's accident was caused by a neutral risk/activity of day-to-day living and is not compensable. Moreover, as claimant's accident is

unexplained, respondent argues claimant did not prove a causal relation between the accident and a condition of his employment.

The issues for the Board's review are:

1. Did claimant suffer an injury by accident arising out of and in the course of his employment with respondent?
 - a. Was claimant's fall the result of an neutral risk?
 - b. Was the accidental injury the prevailing factor in causing his medical condition and need for medical treatment?
2. Is claimant entitled to reimbursement for unauthorized medical expense?
3. Is claimant entitled to medical treatment?

FINDINGS OF FACT

Claimant was employed by respondent for 25 years and held the position of torque monitor for 5 years. On August 8, 2013, claimant fell while descending steel steps and carrying a tool bag. Claimant stated he was on his way to return the tool bag, which held various sizes of torque wrenches ranging in lengths from 1 foot to 2.5 feet long and weighing a total of 15 pounds. Claimant testified, "My heel or something got caught and slipped on the steps and I fell."¹ He further noted he used the handrail while descending the steps.

Claimant stated he felt a stinging sensation going down his legs and pain in his left knee when he fell. He never had those symptoms nor problems with his left leg prior to the fall. Additionally, claimant reported low back and tail bone pain to plant medical following the fall.

In a written statement whereby claimant reported his injury to respondent, claimant indicated the "steps were wet (damp) because [of] humidity."² Claimant was sent to plant medical August 8, 2013, and his left knee and back were treated with ice. The nurse on duty also noted claimant "was going on break and the steps were moist from humidity and he slipped and fell striking the steps and the knee hit the railing."³ Claimant subsequently

¹ P.H. Trans. at 7.

² *Id.*, Resp. Ex. C at 3.

³ P.H. Trans., Resp. Ex. A at 2.

reported he caught his left heel on the top step causing the fall. When asked why he initially reported the steps were wet, claimant testified:

A. Everything happened so fast, I don't know how it happened actually.

Q. Okay. Is that true as you sit here today that you don't know how it happened?

A. I just fell.

Q. Okay. You gave some testimony today that you thought maybe you might have caught your foot or your heel on the step. Do you know whether that happened or is that just a best guess?

A. I'm pretty sure this left heel got caught on the top step and that's what caused the fall.⁴

Prior to the accident, claimant was treating with Dr. Mark Chaplick for ongoing pain management related to the lower back. Claimant was diagnosed with multilevel lumbar stenosis and degenerative disc disease, and facet arthropathy. Claimant was treated with epidural injections and physical therapy. Dr. Chaplick referred claimant to Dr. Gary Go for evaluation of left knee swelling and pain.

Dr. Go took x-rays and ordered an MRI of claimant's left knee. Claimant was found to have a full-thickness tear of the posterior horn of the medial meniscus, intra-articular effusion, and strain of the anterior cruciate ligament. Claimant underwent a partial meniscectomy on September 12, 2013, and followed up with physical therapy.

Dr. Edward J. Prostic evaluated claimant at his counsel's request on October 8, 2013. Claimant presented with pain in the center of his back above the waist, generally without radicular symptoms. Claimant complained of difficulty sleeping and worsening with standing, bending, twisting, lifting, pushing, and pulling. Claimant reported to Dr. Prostic several brief episodes of leg numbness and some diffuse soreness about the left knee with swelling, clicking, popping, and occasional catching. Claimant was taking hydrocodone and Celebrex at the time of the evaluation.

Dr. Prostic reviewed an MRI of the lumbar spine dated September 18, 2013. The MRI revealed diffuse degenerative changes with bulging of all discs and large disc herniation, predominantly central, at L5-S1. The central spinal canal was reduced predominantly at L4-5, but there did not appear to be a critical lesion at that level.

After reviewing claimant's medical records and performing a physical examination, Dr. Prostic opined:

On or about August 8, 2013, [claimant] sustained injuries to his left knee and low back during the course of his employment. He has required surgery to his knee. He is recovering well from his surgery. For his low back, he needs a therapeutic

⁴ P.H. Trans. at 18-19.

exercise program and continued use of anti-inflammatory and analgesic medicines. The work-related injury sustained August 8, 2013 is the prevailing factor in the injury, the medical condition, and the need for medical treatment.⁵

Dr. Chris D. Fevurly performed an independent medical evaluation of claimant at respondent's request on November 1, 2013. Claimant complained of daily mid back and low back pain which was unimproved since the fall in August 2013. Claimant indicated there was numbness that radiates into the legs but no pain, and his left knee was improved following surgery but continued to give out with stairs. Claimant continued his medications.

After reviewing claimant's medical records and performing a physical examination, Dr. Fevurly assessed claimant with left knee medial meniscus tear and plica syndrome which improved following surgery, and chronic low back pain without current clinical examination evidence for lumbar radiculopathy. Dr. Fevurly wrote claimant has "lumbar stenosis produced by multilevel degenerative disc disease and facet arthropathy (as seen by MRI in 2011 and 2013) but there are no current clinical symptoms consistent with neurogenic claudication."⁶ He noted claimant had prior low back pain and previous treatment for the low back, including epidural injections.

Dr. Fevurly opined the August 8, 2013, work event was the prevailing factor in producing claimant's left knee medial meniscus tear. He opined claimant should be at maximum medical improvement in the next two to four weeks following the evaluation and recommended no permanent work restrictions or future medical treatment for the left knee condition. Using the *AMA Guides*,⁷ Dr. Fevurly rated claimant with a two percent impairment of the lower extremity based on the partial medial meniscectomy of claimant's left knee.

Regarding claimant's low back, Dr. Fevurly opined:

The preexisting degenerative changes in the lumbar spine which have been symptomatic on a regular basis over the past three years (prior to the work event of 8/8/13) are the prevailing factors in the current low back and leg complaints. There have been pain clinic assessment and injections performed in 2011, 2012 and 2013 prior to the work event of 8/8/13. In spite of the claim that there was a dramatic change in the MRI and the location and quality of his back and leg pain

⁵ P.H. Trans., Cl. Ex. 1 at 3.

⁶ P.H. Trans., Resp. Ex. B at 8.

⁷ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

following the work event on 8/8/13, it is obvious that the low back condition has been severe and disabling for more than three years before the 8/8/13 event.⁸

Dr. Fevurly indicated claimant did have an impairment to the lumbar spine and restrictions may be recommended, but the impairment and limitations were not causally related to the fall claimant sustained on August 8, 2013.

Respondent was unable to accommodate claimant's restrictions, and claimant remains off work.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

(d) Except as provided in the workers compensation act, no employer, or other employee of such employer, shall be liable for any injury, whether by accident, repetitive trauma, or occupational disease, for which compensation is recoverable under the workers compensation act nor shall an employer be liable to any third party for any injury or death of an employee which was caused under circumstances creating a legal liability against a third party and for which workers compensation is payable by such employer.

K.S.A. 2012 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time

⁸ P.H. Trans., Resp. Ex. B at 8-9.

and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(2)(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . . .

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given

case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁰

ANALYSIS

1. Did claimant suffer an injury by accident arising out of and in the course of his employment with respondent?

a. Was claimant's fall the result of a neutral risk?

Claimant could not remember exactly what caused him to fall down the stairs. The ALJ found it significant that claimant gave varying versions of the accident. In one version, claimant reported that he slipped because the steps were wet. In another version, claimant was pretty sure he caught his heel on the top step. The ALJ found that the injury occurred from no identifiable risk, and the injury arose from a neutral risk.

This Board Member disagrees with the ALJ. A neutral risk has no particular employment or personal character.¹¹ In this instance, the steel stairs are an identifiable risk associated with claimant's employment as claimant is required to traverse the stairs to access his work station. Whether the steps were wet or whether claimant caught his heel, the steps are an identifiable hazard of employment. Claimant suffered an injury by accident to his left knee arising out of and in the course of his employment with respondent.

b. Was the accidental injury the prevailing factor in causing his medical condition and need for medical treatment?

The record contains two medical reports. Dr. Prostic found that the work-related accident was the prevailing factor in causing injuries to claimant's left knee and low back

⁹ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹⁰ K.S.A. 2012 Supp. 44-555c(k).

¹¹ *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641, 644 (1979); K.S.A. 2011 Supp. 44-508(f)(1)(2)(3)(A)(ii)

and the need for medical treatment. Dr. Fevurly found that the work-related accident was the prevailing factor for the left knee injury, but not the low back. Dr. Fevurly wrote that claimant's preexisting degenerative changes in the lumbar spine were the prevailing factor in the current low back and leg complaints.

Based upon a review of Dr. Fevurly's report, claimant had a significant history of medical and chiropractic treatment for low back problems. Dr. Fevurly noted in the medical history portion of his report claimant had an MRI on April 26, 2011, approximately 16 months prior to the alleged accidental injury while working for respondent, that showed multi-level degenerative disc disease and a large central disc bulge leading to narrowing in the central spinal canal.

Dr. Fevurly provided an exhaustive review of claimant's prior medical history based upon medical records from a variety of medical providers. Dr. Prostic did not provide any detailed information regarding the extent to which he relied upon prior medical records as a basis for his prevailing factor opinion, other than a reference to Dr. Chaplick. Dr. Fevurly's prevailing factor opinion is more persuasive. Claimant has failed to prove that his accidental injury of August 8, 2012 was the prevailing factor causing his low back injury and need for medical treatment.

2. Is the claimant entitled to reimbursement for unauthorized medical expense?

This Board Member has reviewed Dr. Prostic's independent medical evaluation report and finds that the examination was for the purpose of examination and diagnosis in compliance with the reimbursement requirements of K.S.A. 2012 Supp. 44-510h(b)(2). However, K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary disability compensation. K.S.A. 44-534a also specifically gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. K.S.A. 2012 Supp. 44-551(i)(2)(A) gives the Board jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. K.S.A. 2012 Supp. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified therein.

The issue whether a worker is entitled to medical compensation is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.¹² This Board Member finds that the ALJ has jurisdiction to determine if claimant is entitled to reimbursement for unauthorized medical expense. Therefore, this issue is not one of which the Board takes jurisdiction in an appeal of a preliminary order.

¹² K.S.A. 2011 Supp 44-534a(a)(2).

3. Is the claimant entitled to medical treatment?

This Board Member does not have jurisdiction to review the ALJ's decision not to allow claimant's request for medical treatment.

CONCLUSION

Claimant suffered an injury to his left knee arising out of and in the course of his employment, and the accidental injury was the prevailing factor in causing his medical condition. Claimant failed to sustain the burden of proving that he suffered an injury to his low back arising out of and in the course of employment. The Board does not have jurisdiction to review the ALJ's decision regarding medical treatment and reimbursement of unauthorized medical expense.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated November 14, 2013, is reversed, in part.

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge